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BY J YOUNT

6 Counsel for Defendants Donald and Catherine Cox

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF YAVAPAI**

9 JOHN B. CUNDIFF and BARBARA C.
10 CUNDIFF, husband and wife; ELIZABETH
11 NASH, a married woman dealing with her
12 separate property; KENNETH PAGE and
13 KATHRYN PAGE, as Trustee of the Kenneth
14 Page and Catherine Page Trust,

12 Plaintiffs,

13 v.

14 DONALD COX and CATHERINE COX,
15 husband and wife, et al., et ux.,

16 Defendants.

Case No. P1300CV20030399

Division Pro Tem A

**DEFENDANTS' COXES MOTION FOR
NEW TRIAL RE: AWARD OF
ATTORNEYS' FEES TO CUNDIFF-
PLAINTIFFS PURSUANT TO ARIZ. R.
CIV. P. 59(A) AND, IN THE
ALTERNATIVE, MOTION TO ALTER
OR AMEND JUDGMENT PURSUANT
TO ARIZ. R. CIV. P. 59(L)**

(Evidentiary Hearing Requested)

(Assigned to Honorable Jeffrey G. Paupore)

17 Defendants Donald and Catherine Cox, by and through undersigned counsel, pursuant to
18 Ariz. R. Civ. P. 7.1, 59(a)(1), (6), and (8), and 59(l) submit this Motion for New Trial Re: Award
19 of Attorneys' Fees to Cundiff-Plaintiffs and, in the Alternative, Motion to Alter or Amend
20 Judgment, as to the award of attorneys' fees in favor of the Cundiff-Plaintiffs. *See* Court's
21 Ruling and Judgment docketed 04/07/15 (the "04/07/15 Judgment").

22
23 **I. OVERVIEW: THE 04/07/15 JUDGMENT IS THE PRODUCT OF**
24 **INCONSISTENT FINDINGS OF FACT.**

25 A judgment or ruling may be set aside where it is shown that "it is based on inconsistent
26 findings of fact." *See Roundy v. Stewart*, 140 Ariz. 201, 203, 680 P.2d 1262 (App. 1984). On
27 the issue of attorneys' fees, the 04/07/15 Judgment is the product of inconsistent findings of fact.
28 Non-party Alfie Ware paid the Cundiff-Plaintiffs'¹ attorneys' fees during the time periods that
29 the Cundiff-Plaintiffs were represented by the Jeffrey Coughlin firm *as well as* the fees incurred
30 by Favour, Moore and Wilhelmsen, P.A. ("**Wilhelmsen**")². The Court properly denied the
31

32 ¹ John B. Cundiff, Barbara C. Cundiff, Elizabeth Nash, Kenneth Page and Katheryn Page.

² n/k/a Favour & Wilhelmsen, PLLC.

1 Coughlin attorneys' fees on the basis that it could "find no reference in this . . . litigation where
2 Mr. Ware was identified as a party Plaintiff." 04/07/15 Judgment, p. 2 . However, the Court
3 *awarded* the Wilhelmsen attorneys' fees on the grounds that the monthly billing statements
4 identified the Client as Mr. and Mrs. John Cundiff. The fact that the Coughlin billing statements
5 were addressed to Alfie Ware while the Wilhelmsen billing statements were addressed to Mr.
6 and Mrs. Cundiff³ is a distinction without a difference. As discussed below, Alfie Ware, not the
7 Cundiff-Plaintiffs, paid all -- or substantially all -- of the Cundiff-Plaintiffs' legal fees. At his
8 Deposition, Plaintiff John Cundiff testified that Alfie Ware was paying the legal expenses and
9 that he (Cundiff) hadn't paid any. John Cundiff's testimony is corroborated by the testimony of
10 Plaintiffs Elizabeth Nash and Katheryn Page, as discussed hereinbelow.

11 The foregoing inconsistent findings of fact as between the Coughlin fees (denied) and
12 Wilhelmsen fees (awarded) have resulted in an erroneous Ruling and Judgment which if allowed
13 to stand would be an abuse of discretion.

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 **II. FACTS.**

16 Despite the fact that he did not own property in the portion of Coyote Springs Ranch
17 governed by the Declaration of Restrictions that is subject of this litigation⁴, in or near September
18 of 2003, Alfie Ware was part of a 'group' of landowners that issued the following letter to
19 Coyote Springs property owners concerning the Coxes' use of their property:

20 A group of land/homeowners . . . have banded together to stop the
21 commercial activity of the Prescott Valley Nursery/Growers at the
front of our community. Litigation is in progress. ***

22 John Cundiff Depo., 08/25/04, pp. 126:18-127:12, attached hereto as Exhibit "1". Plaintiff John
23 Cundiff testified that the "group" of property owners included Alfie Ware and that meetings were
24 held at Mr. Ware's home:

25 Q. You make a reference to a group of land, slash, homeowners, in
26 Coyote Springs that have banded together. Who is that group?

27 A. Let's see. The people involved in the litigation. That would be
28 myself, my wife, the Pages, and, or, yeah, the Pages, and then
Nash, Becky Nash and then Alfie is involved.

30 ³ Some Wilhelmsen billing statements were, in fact, addressed to Katheryn Page.

31 ⁴ The Declaration of Restrictions recorded on June 13, 1974, as Book 916, Page 680, Official Records of
32 Yavapai County.

1 Q. Well you testified earlier today that there were three meetings
2 that were held at Mr. Ware's home. I want to know if your
3 communications with Mr. Ware are limited to those three meetings
or if you've talked to him outside of those meetings.

4 A. Oh, I've talked to him outside of those meetings.

5 Q. How many times have you talked to him regarding the lawsuit
you filed or the claims you've alleged against Mr. or Mrs. Cox?

6 A. I'd have to guess. Is that good?

7 Q. Sure.

8 A. 10.

9 John Cundiff Depo., pp. 127:13-19; pp. 129:11:23, attached hereto as Exhibit "1".

10 **Significantly, Plaintiff John Cundiff testified that Alfie Ware was funding the litigation:**

11 Q. Now there's someone identified named Alfie in the information
12 published by the Lonesome Valley Newsletter. Do you know who
that would be?

13 A. That would be Alfie Ware.

14 Q. Does Alfie Ware live in the portion of Coyote Springs Ranch
that you live in?

15 A. No.

16 Q. Do you have any information regarding why he would be a
17 contact person concerning the action you've brought against Mr.
and Mrs. Cox?

18 A. Well, he's furnishing a majority of the funds.

19 Q. What do you mean he's furnishing the majority of the
funds?

20 A. He's paying the legal expenses.

21 Q. Is he paying all of the legal expenses?

22 A. So far.

23 Q. Are you out-of-pocket anything in connection with the
litigation in which you've sued Mr. and Mrs. Cox?

24 A. Not yet.

25 John Cundiff Depo., p. 120:3-22, attached hereto as Exhibit "1". [emphasis added].

26 Corroborating John Cundiff's testimony, Plaintiff Elizabeth Nash testified that she had no
27 communication with her attorneys (Wilhelmsen) about "money", that she was not paying for the
28 litigation, and that she believed Alfie Ware was paying her attorneys (Wilhelmsen):

29 **Q. You're not paying for this litigation, are you?**

30 **A. I haven't paid anything.**

31 Q. Okay. Who has?

32 A. I have no idea who has.

Q. You have no idea who is paying for your attorneys in this case?

A. I do not know -- **I have not spoken about money with my attorneys, no.**

Q. You've never written a check or given any money to your attorneys for this litigation of this case, have you?

A. I haven't, no.

Q. But you have no idea who is paying for your attorneys?

Ms Kirk: Object as to form.

The Witness: I have not spoken with my attorneys regarding money.

1 **Q. (Continued by Mr. Adams) Okay. You have no information**
2 **regarding who is paying your attorneys to pursue the litigation**
3 **against my clients?**

4 ***

5 **The Witness: I have heard that Alfie is paying some, but**
6 **there are other people who have also paid.**

7 ***

8 Elizabeth Nash Depo., 09/10/04, pp. 31:12 - 32:17, attached hereto as Exhibit "2". [emphasis
9 added]. And, Katheryn Page testified that this litigation was funded by people other than the
10 property owners governed by the subject Declaration of Restrictions:

11 Q. And who was in attendance at that meeting, besides you and
12 Mr. Launderers.

13 A. John Cundiff, Barbara Cundiff. I'm not sure if Becky or Tom
14 Nash were there. There was just -- There weren't very many.
15 Alfie [Ware] might have been there. I'm not certain of that. I
16 don't know -- I'm not sure when that meeting occurred. Then there
17 was a meeting at Alfie's house, and --

18 ***

19 A. Well, I remember Bob Launderers at a meeting at Alfie's home,
20 Alfie Ware's.

21 Q. Okay. Would I be safe in assuming that Alfie Ware was present
22 during that meeting?

23 A. Yes.

24 ***

25 Q. *** Again, the Wares don't own property in the section of
26 Coyote Springs that your property is located in, correct?

27 A. Correct.

28 Q. Who else was at the meeting at the Wares' household?

29 A. I believe Dick Gunther was there, Barbara and John Cundiff,
30 myself and my husband, . . . I think Becky Nash was there and
31 possible Tom Nash. I'm not sure about them.

32 ***

33 Q. *** And has any money exchanged hands in those meetings or
34 in connection with this informal group of people that have come
35 together to fund this litigation?

36 A. Yes.

37 Q. *** Has any of that money come from people who don't live in
38 the Coyote Springs portion of the subdivision that you and the
39 Coxes own property in?

40 A. Yes.

41 Katheryn Page Depo., 06/23/04, pp. 54:20 - 55:2, 64:9-65:1, 156:21-157:4, attached hereto as
42 Exhibit "3".

43 Counsel for the Coxes deposed Plaintiffs John Cundiff, Elizabeth Nash and Katheryn
44 Page during Wilhelmssen's representation of the Cundiff-Plaintiffs. Moreover, the Cundiffs'
45 Affidavit dated 08/28/13 is consistent with the foregoing testimony. See Exhibit "1" attached to
46 Reply in Support of Plaintiffs' Rule 54(g) Motion for Award of Attorneys' Fees and Non-
47 Taxable Costs filed 08/28/13 ("We have repaid Mr. Ware some of what he paid and were

1 planning to make further payments when he told us not to pay him any more until the case was
2 over”).

3 Undersigned Counsel previously briefed at length the impropriety of awarding attorneys’
4 fees to Plaintiffs in view of non-party Alfie Ware’s gratuitous subsidy of the Plaintiffs’ litigation,
5 as follows:

6 As set forth above, “[a]t least two requirements are
7 necessary for the recovery of attorney’s fees: an attorney client
8 relationship between the party and counsel, and ‘a genuine
9 financial obligation on the part of the litigant[] to pay such fees.’”
10 *Moedt v. General Motors Corp.*, 204 Ariz. 100, 103, 60 P.3d 240,
11 243 (App. 2003) (citing *Lisa v. Strom*, 183 Ariz. 415, 419, 904
12 P.2d 1239, 1243 (App. 1995)). In the case at bar, the Cundiff
13 plaintiffs are unable to establish any “genuine” financial obligation
14 to pay attorneys’ fees, which is being underwritten by Mr. Alfie
15 Ware, a non-party to the lawsuit, who is not subject to the Coyote
16 Springs Ranch Declaration in dispute. Alfie Ware lacks standing
17 to recover attorneys’ fees. Alfie Ware is not an aggrieved party
18 pursuant to Ariz. R. Civ. P. 1. Moreover, the *Lisa* court’s rationale
19 for denying attorneys’ fees to a self-represented attorney-litigant is
20 equally persuasive in the case at bar. That is, “the general rule
21 against awarding fees to attorney-litigants is based upon a
22 perception that such awards are windfalls to persons who have
23 spent no money and incurred no debt for legal representation. ***
24 The judicial system would be unfair if an attorney-litigant could
25 qualify for a fee award without incurring the potential
26 out-of-pocket obligation that the opposing non-lawyer party must
27 bear in order to qualify for a similar award.” *Lisa*, 183 Ariz. at
28 419, 904 P.2d at 1243.

29 The foregoing principle applies with at least equal force
30 here, where the Cundiff plaintiffs have not spent a dime of their
31 own monies in prosecuting the case. Common sense as well as the
32 law dictates that the Cundiff plaintiffs are not entitled to a windfall.
See *Lisa*, 183 Ariz. at 420, 904 P.2d at 1244 (attorney’s fees are
meant to make a party whole for costs incurred for an attorney’s
services. The Lisas candidly admitted that Mrs. *Lisa* nor the
community would reimburse Mr. *Lisa* or his law firm for any time
expended, absent an award of fees by the court); ARS §
12-341.01(B) (“The award of reasonable attorneys’ fees awarded
pursuant to subsection A should be made to mitigate the burden of
the expense of litigation to establish a just claim or defense”);
Catalina Foothills Assoc., Inc. v. White, 132 Ariz. 427, 646 P.2d
312 (App. 1982) (citing ARS Section 12-341.01(B)).

33 A court has discretion to award attorneys fees in
34 circumstances involving the insurance company’s contractual
35 obligation to pay attorneys fees to defend its insured. *Catalina*
36 *Foothills Assoc., Inc. v. White*, 132 Ariz. 427, 646 P.2d 312 (App.
37 1982); *Wilcox, D.D.S. v. Waldman*, 154 Ariz. 532, 744 P.2d 444
38 (App. 1987); *Orlfaly v. Tucson Symphony Society*, 209 Ariz. 260,
39 99 P.3d 1030 (App. 2005). However, the case at bar is readily
40 distinguished from *Catalina Foothills* and its progeny. This case
41 does not involve a situation in which the Cundiff plaintiffs have
42 procured a contract with Ware to be indemnified for a triggering
event. In other words, Mr. Ware is neither an insurer nor an
indemnitor. Even disregarding this factual distinction, the

1 appellate court in *Catalina Foothills* has held that the trial court in
2 its discretion may always consider the fact that someone else may
3 be obligated to bear the expense. *Catalina Foothills*, 132 Ariz. at
4 428, 646 P.2d 313. ***

5 Defendants' Cox Response and Objection to Plaintiffs' Requests For Award of Attorneys' Fees,
6 pp. 21:22-23:15, and pp. 24:18-25:11.

7 On April 7, 2015⁵, the Court entered a Ruling, holding in part as follows:

8 Plaintiff's Motion for Attorneys' Fees included supporting
9 affidavits with billing statements from the law firms of Favor,
10 Moore and Wilhelmsen, P.A. ("Wilhelmsen") and J. Jeffrey
11 Coughlin, PLLC, ("Coughlin").

12 Wilhelmsen's monthly billing statement identified the clients as
13 Mr. and Mrs. John Cundiff v. Donald and Katherine Cox, Deed
14 Restriction Enforcement. The Wilhelmsen affidavit avows "The
15 Client has agreed to or has paid the hourly billing rates..."

16 Coughlin's monthly billing statement identified the client as Alfie
17 Ware, Coyote Springs. The Coughlin affidavit avows "The Client
18 has paid or agreed to pay the total charges..." The Coughlin
19 affidavit does not explain the nexus between the deed restriction
20 enforcement case against the Coxes and Mr. Ware. The Court
21 could find no reference in this lengthy civil litigation case where
22 Mr. Ware was identified as a party Plaintiff. Therefore, Plaintiff's
23 request for reasonable attorneys' fees under the Coughlin affidavit
24 are denied.

25 Pursuant to this Court's discretion, Plaintiffs are entitled to their
26 reasonable attorneys' fees and costs.

27 Although there is no argument with the general proposition that the Court has discretion
28 regarding the award of reasonable attorneys' fees to the successful party pursuant to A.R.S. § 12-
29 341.01, the Court is proscribed from allowing an inconsistent verdict, judgment or ruling to stand
30 because doing so would be an abuse of that discretion. The Court properly denied attorneys' fees
31 incurred by the Coughlin firm because their fees were being paid by Alfie Ware, a non-party to
32 this litigation. The same is true as to the attorneys' fees incurred by Wilhelmsen. The great
majority of those fees were paid by Alfie Ware. An evidentiary hearing is necessary to determine
how much of those attorneys fees were paid by parties to this litigation.

30 ⁵ date of filing.

1 **III. LEGAL ANALYSIS.**

2 The Court may grant a new trial based upon the following grounds:

3 A verdict, decision or judgment may be vacated and a new trial granted on motion
4 of the aggrieved party for any of the following causes materially affecting that
party's rights:

5 1. Irregularity in the proceedings of the court, referee, jury or prevailing party, or
any order or abuse of discretion, whereby the moving party was deprived of a fair
6 trial.

7 6. Error in the admission or rejection of evidence, . . . or other errors of law
occurring . . . during the progress of the action.

8 8. That the . . . decision, findings of fact, or judgment is not justified by the
evidence or is contrary to law.

9 Ariz. R. Civ. P. 59(a)(1), (6), and (8). The Court may also amend or alter a judgment pursuant to
10 Ariz. R. Civ. P. 59(l).

11 **A. An Inconsistent Ruling Warrants A New Trial and, Alternatively, an**
12 **Amendment of the Judgment.**

13 When ruling on a motion for new trial, a trial court is entitled to evaluate the credibility of
14 witnesses and weigh the evidence to determine if the verdict is against the weight of the evidence
15 and contrary to substantial justice. *McBride v. Kieckhefer Assoc.*, 228 Ariz. 262, 265 P.3d 1061
16 (App. 2011). As our appellate courts have held:

17 We have indicated that it is the duty of the trial court to:
18 “* * * pass on the weight of the evidence and if, after a full consideration of the
case, in its discretion it believes that the verdict was contrary to the weight of the
19 evidence, and that substantial justice has not been done between the parties, it is
its duty to set aside the verdict and grant a new trial.” *Young Mines Co. v.*
Citizens' State Bank, 37 Ariz. 521, 296 P. 247, 249.

20 *Smith v. Moroney*, 79 Ariz. 35, 38, 282 P.2d 470, -- (1955).

21 Importantly, a ruling may be set aside where it is shown that “it is based on
22 inconsistent findings of fact.” *Roundy v. Stewart*, 140 Ariz. 201, 680 P.2d 1262 (App. 1984);
23 see *McBride*, 228 Ariz. 262, 265 P.3d 1061.

24 The 04/07/15 Judgment denied the portion of the Cundiff Attorneys' fees submitted by J.
25 Jeffrey Coughlin, PLLC (“Coughlin”)⁶ for the reason that there was no “nexus between the deed
26 restriction enforcement case against the Coxes and Mr. Ware” and Mr. Ware was not a party
27 Plaintiff. 04/07/15 Judgment, p. 2, 6th paragraph. However, the Court awarded the portion of
28

29
30 ⁶ See Aff. Of J. Jeffrey Coughlin in Support of Application for Attorneys' Fees and Costs dated
07/02/2013.

1 the Cundiff-Plaintiffs Attorneys' Fees submitted by Wilhelmsen based upon Wilhelmsen's
2 monthly billing statements, which identified the Client as Mr. and Mrs. John Cundiff. These
3 monthly billing statements do not establish who was paying the Cundiff-Plaintiffs' attorneys'
4 fees. However, the testimony of Plaintiffs John Cundiff, Elizabeth Nash and Katheryn Page
5 excerpted *supra*, makes it crystal clear that non-party Alfie Ware, *not* Mr. and Mrs. Cundiff, paid
6 for the litigation, including Wilhelmsen's attorneys' fees.

7 If the Court requires further clarity on the issue of who paid the Wilhelmsen attorneys'
8 fees, the Court in its discretion may hold an evidentiary hearing, as follows:

9 *** On a motion for a new trial in an action tried without a jury, the court may
10 open the judgment if one has been entered, take additional testimony, amend
11 findings of fact and conclusions of law or make new findings and conclusions,
12 and direct the entry of a new judgment.

13 Ariz. R. Civ. P. 59(b).

14 Applying well-settled principles of law to the facts discussed *supra* readily demonstrate
15 the inconsistency of, on the one hand, denying the Coughlin attorneys' fees and, on the other,
16 awarding the Wilhelmsen attorneys' fees. That is because Alfie Ware paid both the Coughlin-
17 and the Wilhelmsen attorneys' fees.

18 The Court's Ruling on the Wilhelmsen legal fees is inconsistent with the rationale upon
19 which it denied the Coughlin legal fees, and amounts to a 'legal impossibility'. Defendants Cox
20 respectfully submit that the Court erred in failing to take into consideration that the Cundiff-
21 Plaintiffs did *not* pay Wilhelmsen's legal fees. Alfie Ware paid the Wilhelmsen legal fees, just
22 as Alfie Ware paid the Coughlin legal fees.⁷ Alfie Ware was not subject to Joinder because his
23 property is not governed by the subject Declaration of Restrictions that is the subject of the case
24 at bar. The foregoing conclusion is supported by the language of the Declaration itself, which
25 provides that "persons owning said premises or any portion thereof" may "recover damages or
26 other dues from such violations." See Declaration, page 3, ¶ 19, attached hereto as Exhibit "4".
27 The inference to be drawn from this language is that a person who does not own property
28 governed by the Declaration is not entitled to damages or other dues, including attorneys' fees.
29 Alfie Ware does not own property subject to the Declaration, and was not subject to joinder.

30 ⁷ Wilhelmsen billed at least 16.5 hours of time communicating with Alfie Ware. See Exhibit "4" attached
31 to Defendants' Cox Response and Objection to Plaintiffs' Requests For Award of Attorneys' Fees.
32

1 Moreover, Alfie Ware is *not* a party to this litigation and is *not* an insurer of the Cundiff-
2 Plaintiffs. Defendants' Cox Response and Objection to Plaintiffs' Requests For Award of
3 Attorneys' Fees, pp. 21:22-23:15, and pp. 24:18-25:11, excerpted *supra*. Simply put, Alfie Ware
4 gratuitously undertook to pay for the litigation against the Coxes. Because the 04/07/15
5 Judgment is the result of inconsistent findings of fact on the issue of attorneys' fees, it was an
6 abuse of discretion to enter an award of attorneys' fees (i.e., the Wilhelmsen legal fees) in favor
7 of the Cundiff-Plaintiffs.

8 Based upon the foregoing facts and law, Defendants Cox respectfully request that the
9 Court grant a new trial and, alternatively, amend its Ruling and Judgment on the issue of the
10 award of the Wilhelmsen attorneys' fees to the Cundiff-Plaintiffs in the amount of two-hundred
11 fifty-eight thousand nine hundred eight-six dollars and fifty-two cents (\$258,986.52). *See*
12 04/07/15 Judgment, p. 2, 4th through 8th paragraphs. Precisely like the Coughlin attorneys' fees,
13 Alfie Ware also paid for the Wilhelmsen attorneys' fees. To avoid internal inconsistency in its
14 Ruling and Judgment, which constitutes an abuse of discretion, the Court should deny the
15 Wilhelmsen attorneys' fees. The Coxes respectfully request attorneys' fees pursuant to A.R.S.
16 §12-341.01 and/or contract.

17 RESPECTFULLY SUBMITTED this 22 day of April, 2015.

18 MUSGROVE DRUTZ KACK & FLACK, PC

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)	
CUNDIFF, husband and wife;)	
ELIZABETH NASH, a married woman)	
dealing with her separate)	
property; KENNETH PAGE and)	No. CV 2003 0399
KATHERYN PAGE, as Trustees of)	
the Kenneth Page and Katheryn)	
Page Trust,)	
)	
)	
Plaintiffs,)	
)	
vs.)	
)	
DONALD COX and CATHERINE COX,)	
husband and wife,)	
)	
Defendants.)	
)	

DEPOSITION OF JOHN B. CUNDIFF

Prescott Valley, Arizona
August 25, 2004
9:11 a.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

1 being --

2 A. Yes.

3 Q. Now there's someone identified named Alfie in
4 the information published by the Lonesome Valley
5 Newsletter. Do you know who that would be?

6 A. That would be Alfie Ware.

7 Q. Does Alfie Ware live in the portion of Coyote
8 Springs Ranch that you live in?

9 A. No.

10 Q. Do you have any information regarding why he
11 would be a contact person concerning the action you've
12 brought against Mr. and Mrs. Cox?

13 A. Well, he's furnishing a majority of the funds.

14 Q. What do you mean he's furnishing the majority
15 of the funds?

16 A. He's paying the legal expenses.

17 Q. Is he paying all of the legal expenses?

18 A. So far.

19 Q. Are you out-of-pocket anything in connection
20 with the litigation in which you've sued Mr. and Mrs.
21 Cox?

22 A. Not yet.

23 Q. Has anybody contacted you, to your knowledge,
24 in response to the information you've had published in
25 the Lonesome Valley Newsletter?

1 A. I don't recall him ever mentioning it.

2 Q. How often do you speak with Mr. Ware regarding
3 this lawsuit?

4 A. Oh, every couple of weeks or so.

5 Q. You also made the statement in the September
6 2003 Lonesome Valley Newsletter that, "If you want to
7 keep our CC & R's alive and working on our behalf, please
8 join with us in the effort." Has anybody contacted you
9 and said that they want to assist you in keeping the,
10 quote, "CC & R's alive and working," end quote?

11 A. Yes.

12 Q. Who?

13 A. Dick Gunther.

14 Q. Anybody else?

15 A. I can't recall anyone else contacting me.

16 Q. Anybody else?

17 A. I don't recall anyone else, no.

18 Q. Okay. And then in the September 2003 Lonesome
19 Valley Newsletter, it references a letter that was handed
20 out to various land owners that reads as follows:

21 "Dear Land Owner: A group of land/homeowners
22 in Coyote Springs have banded together to stop the
23 commercial activity of the Prescott Valley
24 Nursery/Growers at the front of our community.
25 Litigation is in progress. They went through the area to

1 find those who are in violation. Your parcel was on
2 their list. We feel that they are grasping at straws on
3 some of these accusations. We will be trying to contact
4 you for more information."

5 "If," and I think this is a typo. It says if,
6 but I think it should read it, "would be greatly
7 appreciated if you would call one of us so that we can
8 rectify this as soon as possible. We have a deadline to
9 meet."

10 You authorized that letter to be circulated;
11 is that correct?

12 A. Yes.

13 Q. You make a reference to a group of land,
14 slash, homeowners, in Coyote Springs that have banded
15 together. Who is that group?

16 A. Let's see. The people involved in the
17 litigation. That would be myself, my wife, the Pages,
18 and, or, yeah, the Pages, and then Nash, Becky Nash and
19 then Alfie is involved.

20 Q. Is there any other person who is involved in
21 that group?

22 A. Well, Dick Gunther went to some of the
23 mediation meetings.

24 Q. Anybody else?

25 A. No, not that I can think of.

1 Q. My question, though, was did you have one?

2 A. I don't know. I can't recall.

3 Q. Do you know if Alfie Ware has received any
4 responses to the letter which was handed out to various
5 property owners?

6 A. No. He hasn't talked to me about that.

7 Q. Your communications with Mr. Ware have
8 occurred outside of the three meetings he had at his
9 house; is that correct?

10 A. Say that again.

11 Q. Well, you testified earlier today that there
12 were three meetings that were held at Mr. Ware's home. I
13 want to know if your communications with Mr. Ware are
14 limited to those three meetings or if you've talked to
15 him outside of those meetings.

16 A. Oh, I've talked to him outside of those
17 meetings.

18 Q. How many times have you talked to him
19 regarding the lawsuit you filed or the claims you've
20 alleged against Mr. or Mrs. Cox?

21 A. I'd have to guess. Is that good?

22 Q. Sure.

23 A. 10.

24 Q. Did you talk about any other property owners
25 during the course of those 10 discussions?

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)
CUNDIFF, husband and wife;)
ELIZABETH NASH, a married woman)
dealing with her separate)
property; KENNETH PAGE and) No. CV 2003 0399
KATHERYN PAGE, as Trustees of)
the Kenneth Page and Katheryn)
Page Trust,)
)
)
)
Plaintiffs,)
)
vs.)
)
)
DONALD COX and CATHERINE COX,)
husband and wife,)
)
)
Defendants.)
)

DEPOSITION OF ELIZABETH NASH

Prescott Valley, Arizona
September 10, 2004
10:08 a.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

1 to enforce the Declaration of Restrictions against those
2 property owners?

3 A. No.

4 Q. Why not?

5 A. I believe this was asked before. I have
6 not -- just haven't had the time or the --

7 Q. Tell me about your agreement with Alfie Ware
8 related to the financing of this lawsuit.

9 A. My agreement?

10 Q. Yes.

11 A. I don't have an agreement with Alfie Ware.

12 Q. You're not paying for this litigation, are
13 you?

14 A. I haven't paid anything.

15 Q. Okay. Who has?

16 A. I have no idea who has.

17 Q. You have no idea who is paying for your
18 attorneys in this case?

19 A. I do not know -- I have not spoken about
20 money with my attorneys, no.

21 Q. You've never written a check or given any
22 money to your attorneys for the litigation of this case,
23 have you?

24 A. I haven't, no.

25 Q. But you have no idea who is paying for your

1 attorneys?

2 MS. KIRK: Object as to form.

3 THE WITNESS: I have not spoken with my
4 attorneys regarding money.

5 Q. (Continued by MR. ADAMS) Okay. You have no
6 information regarding who is paying your attorneys to
7 pursue the litigation against my clients?

8 MS. KIRK: Object as to form. That's the
9 fourth time you've asked the same question, Counsel.

10 MR. ADAMS: No, my question is different,
11 Counsel.

12 Please read back my question to her.

13 (Whereupon, the previous question was read
14 back by the court reporter.)

15 THE WITNESS: I have heard that Alfie is
16 paying some, but there are other people who have also
17 paid.

18 Q. (Continued by MR. ADAMS) When you say you
19 heard, who did you hear it from?

20 A. I do not recall.

21 Q. Turn to the first page of the Declaration of
22 Restrictions, please. Explain to me what paragraph two
23 means.

24 MS. KIRK: Object as to form.

25 THE WITNESS: That you cannot have a

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)	
CUNDIFF, husband and wife;)	
ELIZABETH NASH, a married woman)	
dealing with her separate)	
property; KENNETH PAGE and)	No. CV 2003 0399
KATHERYN PAGE, as Trustees of)	
the Kenneth Page and Katheryn)	
Page Trust,)	
)	
)	
Plaintiffs,)	
)	
vs.)	
)	
DONALD COX and CATHERINE COX,)	
husband and wife,)	
)	
Defendants.)	
)	

DEPOSITION OF KATHERYN PAGE

Prescott, Arizona
June 23, 2004
9:36 a.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

1 Q. Okay.

2 A. It's been such a long time, that I don't
3 remember all the details, but I know that the neighbors
4 were talking. I don't know -- I don't remember.

5 MS. KIRK: Are you asking her, was there a
6 pre-meeting --

7 MR. ADAMS: Yes.

8 MS. KIRK: -- like, everybody gets
9 together in a room or something --

10 MR. ADAMS: Thank you, Counselor. Was
11 there --

12 MS. KIRK: As opposed to a series of
13 discussions. That's what he's asking. Did you have,
14 like, a prior meeting in somebody's office where all
15 these people attended?

16 THE WITNESS: Before that meeting? I
17 don't think so. I don't remember. I remember that there
18 were some meetings. There was a meeting at Bob Launders'
19 office.

20 Q. (Continued by MR. ADAMS) And who was in
21 attendance at that meeting, besides you and Mr. Launders?

22 A. John Cundiff, Barbara Cundiff. I'm not sure
23 if Becky or Tom Nash were there. There was just --
24 There weren't very many. Alfie might have been there.
25 I'm not certain of that. I don't know -- I'm not sure

1 when that meeting occurred. Then there was a meeting at
2 Alfie's house, and --

3 Q. And that's Alfie Ware?

4 A. Yes.

5 Q. Spelled W-A-R-E?

6 A. A-R-E. Alfie and CC Ware.

7 Q. Okay.

8 A. And I'm not sure whether that -- I'm not sure
9 the chronological order of these meetings. I don't
10 remember. I don't -- I can't remember. That's why I
11 keep a journal, because I can't remember things.

12 Q. Okay. So you write down, in chronological
13 order, things as they occur with respect to events out in
14 Coyote Springs Ranch?

15 A. I have --

16 MS. KIRK: Objection. Go ahead.

17 THE WITNESS: I have a habit of writing
18 down in a journal if I have meetings to attend. I don't
19 go into detail. Sometimes I write them down. Sometimes
20 I'll just remember it, if it's that week, and I'll forget
21 to write it down. But as a rule I keep a journal.

22 Q. (Continued by MR. ADAMS) And that journal has
23 date entries, correct?

24 A. Yes, it's got dates, and I just fill in what
25 events that I have to attend and so forth.

1 conversation with Mr. Sanders, there was another meeting
2 in which Mr. Launders was present; is that correct?

3 A. After that, yes.

4 Q. And that meeting with Mr. Launders was also
5 prior to the meeting at the church, correct?

6 A. I am not sure about the time.

7 Q. Okay. Fair enough. At the meeting that Mr.
8 Launders was present at, who else was also present?

9 A. Well, I remember Bob Launders at a meeting at
10 Alfie's home, Alfie Ware's.

11 Q. Okay. Would I be safe in assuming that Alfie
12 Ware was present during that meeting?

13 A. Yes.

14 Q. Was her husband present at that meeting?

15 A. Alfie is the guy. His wife, yes, CC, she was
16 there also.

17 Q. Okay. Again, the Wares don't own property in
18 the section of Coyote Springs Ranch that your property is
19 located in, correct?

20 A. Correct.

21 Q. Who else was at the meeting at the Wares'
22 household?

23 A. I believe Dick Gunther was there, Barbara and
24 John Cundiff, myself and my husband, possibly -- I think
25 Becky Nash was there and possibly Tom Nash. I'm not sure

1 about them.

2 Q. Anybody else that you can recall?

3 A. I can't recall anybody else.

4 Q. Was the meeting in the morning, evening, or
5 afternoon?

6 A. It was probably in the afternoon. I'm not
7 sure. I'm not certain.

8 Q. On the weekday or during the weekend?

9 A. I think it was during the week, I believe.

10 Q. Okay. Was Mr. Launders at that meeting as
11 well?

12 MS. KIRK: Objection.

13 THE WITNESS: He was at -- Yes, I believe
14 so.

15 Q. (Continued by MR. ADAMS) Did the issue, or
16 the discussion -- Strike that.

17 Was water usage on the Coxes' property
18 discussed at that meeting?

19 A. It was probably brought up.

20 Q. Okay. Who brought it up?

21 A. I don't know.

22 Q. What was discussed?

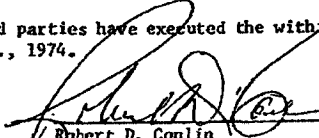
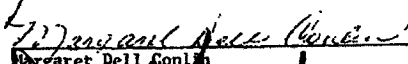
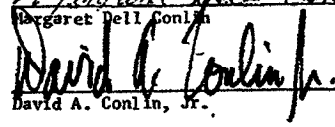
23 A. Water usage, how much they were taking out of
24 the well, that -- I'm not sure beyond that.

25 Q. What else was discussed at that meeting at the

383 MAY 2

19. If there shall be a violation or threatened or attempted violation of any of said covenants, conditions, stipulations or restrictions, it shall be lawful for any person or persons owning said premises or any portion thereof to prosecute proceedings at law or in equity against all persons violating or attempting to, or threatening to violate any such covenants, restrictions, conditions or stipulations, and either prevent them or him from so doing or to recover damages or other dues for such violations. No failure of any other person or party to enforce any of the restrictions, rights, reservations, limitations, covenants and conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof. The violation of these restrictive covenants, conditions or stipulations or any one or more of them shall not affect the lien of any mortgage now of record, or which hereafter may be placed of record, upon said premises or any part thereof.

IN WITNESS WHEREOF, the above named parties have executed the within Declaration of Restrictions this 12th day of June, A.D., 1974.

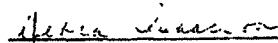

Robert D. Conlin

Margaret Dell Conlin

David A. Conlin, Jr.

STATE OF ARIZONA }
County of Maricopa } ss.

On this, the 12th day of June, 1974, personally appeared Robert D. Conlin and Margaret Dell Conlin, his wife.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

My commission expires: 2-26-77

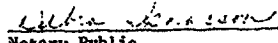

Notary Public

STATE OF ARIZONA }
County of Maricopa } ss.

On this, the 12th day of June, 1974, personally appeared David A. Conlin, Jr.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

My commission expires: 2-26-77


Notary Public